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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF ARIZONA**

8
9 Kini M. Seawright; *et al.*,

10 Plaintiff,

11 v.

12 State of Arizona; *et al.*,

13 Defendants.

No. CV 11-1304-PHX-JAT

ORDER

14
15 Pending before the Court is Plaintiffs' Rule 60(B)(1) Motion to Set Aside two
16 Orders of the Court (Doc. 94). Defendants have filed a Response (Doc. 105) and
17 Plaintiffs have filed a Reply (Doc. 111). The Court denies Plaintiffs' motion for the
18 following reasons.

19 **I. BACKGROUND**

20 Plaintiffs are the Estate of Dana Seawright and Dana Seawright's mother, Kini
21 Seawright. On July 3, 2010, Dana was an inmate at the Arizona State Prison Complex
22 Lewis ("ASPC-Lewis"). Dana was attacked in his cell by fellow inmates. Correctional
23 Officers found him in his cell bleeding from multiple stab wounds. Four days later Dana
24 died from injuries suffered in the attack. Plaintiffs filed a civil suit against Defendants
25 and ultimately filed a Second Amended Complaint making a federal claim under 42
26 U.S.C. § 1983 and various state law claims. (Doc. 53). Plaintiffs' state law claims
27 include a claim for gross negligence against Defendant the State of Arizona. (*Id.* at 19).
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1 In their pending motion, Plaintiffs request that the Court set aside two prior Orders
2 under Federal Rule of Civil Procedure 60(b)(1). (Doc. 94). First, Plaintiffs ask the Court
3 to re-open discovery, and second, Plaintiffs ask the Court to set aside the Order (Doc. 73)
4 dismissing Defendant Charles L. Ryan from this lawsuit.

5 On July 11, 2012, the Court entered an Order on amended stipulation to continue
6 dates (Doc. 59), which imposed the following deadlines: Plaintiffs' expert disclosure and
7 expert reports were due October 15, 2012; Defendants' rebuttal experts and reports were
8 due October 15, 2012; the parties' rebuttal experts were due on November 15, 2012; and
9 the Court ordered that discovery shall be completed by November 15, 2012. Plaintiffs
10 did not and to this date have not disclosed an expert witness. Under Arizona law, an
11 expert witness is required to establish the standard of care for the finder of fact in a gross
12 negligence claim involving a correctional facility like ASPC-Lewis. *See Porter v. Ariz.*
13 *Dep't of Corr.*, 2:09-CV-2479-HRH, 2012 WL 7180482, at *3-*5 (D. Ariz. Sept. 17,
14 2012).

15 Approximately three months after discovery closed, in February 2013, Defendants
16 filed a motion for summary judgment seeking dismissal of the gross negligence claim
17 because of Plaintiffs' failure to disclose the requisite expert witness. (Doc. 83 at 16-20).
18 Plaintiffs concede that Arizona law requires an expert witness to establish a standard of
19 care for Plaintiffs' gross negligence claim. (Doc. 97 at 25). Now Plaintiffs request that
20 the Court suspend ruling on Defendants' pending motion for summary judgment (Doc.
21 83). Plaintiffs argue that the Court should set aside the order setting a deadline for
22 discovery (Doc. 59) and re-open discovery for an additional ninety days to allow
23 Plaintiffs the opportunity to find and disclose an expert witness in this case and allow
24 Defendants time for depositions if needed. (Doc. 94 at 2).

25 In February 2013, this Court also entered an order dismissing Defendant Charles
26 L. Ryan from this case because Plaintiffs' failed to state a claim upon which relief can be
27 granted in their Second Amended Complaint. (Doc. 73 at 5-13). Plaintiffs now request
28 that this Court set aside this order dismissing Mr. Ryan from this lawsuit and allow

1 Plaintiffs to further engage in discovery to prove their dismissed claims against Mr.
2 Ryan. (Doc. 94 at 5).

3 **II. ANALYSIS**

4 As an initial matter, Plaintiffs have filed their motion to set aside under Federal
5 Rule of Civil Procedure 60(b)(1). “Rule 60(b) provides for extraordinary relief and may
6 be invoked only upon a showing of exceptional circumstances.” *Engleson v. Burlington*
7 *N. R. Co.*, 972 F.2d 1038, 1044 (9th Cir. 1992) (quoting *Ben Sager Chemicals Int’l, Inc.*
8 *v. E. Targosz & Co.*, 560 F.2d 805, 809 (7th Cir. 1977)). Rule 60(b)(1) is also
9 inapplicable to Plaintiffs’ requests. Rule 60(b) is entitled “Grounds for Relief from a
10 Final Judgment, Order, or Proceeding.” Rule 60(b)’s “Advisory Committee Notes clarify
11 that the adjective ‘final’ applies not only to ‘judgment,’ but to ‘order’ and ‘proceeding’ as
12 well. Rule 60(b) does not apply to non-final orders.” *Connors v. Iquique U.S.L.L.C.*,
13 C05-334JLR, 2005 WL 3007127, at *7 (W.D. Wash. Nov. 9, 2005) (citing *Santa Monica*
14 *BayKeeper*, 254 F.3d 882, 886-87 (9th Cir. 2001)).

15 This case is still pending. No final judgment, final order, or final proceeding has
16 been entered nor occurred in this case. The order setting the discovery deadline (Doc.
17 59) and the order dismissing Mr. Ryan from the case (Doc. 73) were interlocutory orders.
18 Accordingly, Rule 60(b)(1) does not apply.

19 Plaintiffs’ sole argument for the Court to set aside its prior orders is based on a
20 finding of excusable neglect. Plaintiffs explain that this case was initially assigned to an
21 associate, Amy Wallace, at Gillespie, Shields, and Durrant (the “Gillespie firm”)—the
22 law firm representing Plaintiffs. Ms. Wallace was hired by the Gillespie firm in 2011
23 after twenty years of practice in California and an “A” rating from Martindale Hubble.
24 Further, Ms. Wallace was a partner at the firm she left. Plaintiffs’ counsel states that Ms.
25 Wallace “had substantial experience representing clients in ‘1983’ cases and other
26 matters involving claims by inmates or former prison inmates.” (Doc. 94 at 3). When
27 Plaintiffs’ hired the Gillespie firm, this case was immediately assigned to Ms. Wallace.

28 Plaintiffs’ argue that excusable neglect is shown because Ms. Wallace continued

1 to work on cases from her previous firm to the detriment of cases that she was assigned
2 by the Gillespie firm. Apparently, in late December 2012, the Gillespie firm became
3 aware of Ms. Wallace's conduct, she was fired, and her case load was shared by the
4 remaining attorneys at the firm. It was not until other lawyers began to review this case
5 that they discovered Ms. Wallace had neglected this case as well and allowed the
6 discovery and disclosure period to expire without retaining an expert and doing necessary
7 discovery. (*Id.* at 4). Plaintiffs concede that hiring an expert and doing basic discovery
8 regarding Mr. Ryan's practices and procedures were fundamental in dealing with "the
9 Motion regarding Mr. Ryan" and in having expert testimony to establish standard of care
10 in their gross negligence claim. (*Id.*). Plaintiffs argue that this establishes "excusable
11 neglect" sufficient to set aside "the prior order regarding Mr. Ryan and to extend the
12 discovery/disclosure period." (*Id.* at 4-5). Further, Plaintiffs state that "[w]ith respect to
13 the order dismissing Charles L. Ryan, Ms. Wallace failed to conduct sufficient discovery
14 to show that Mr. Ryan knew of the substantial risk of harm to inmates in Lewis Prison . .
15 . ,," and "Ms. Wallace failed to make any reasonable attempt to engage in discovery that
16 would provide evidence of Mr. Ryan's deliberate indifference." (*Id.* at 5).

17 The Court will deny Plaintiffs' motion for myriad reasons. First, the order
18 dismissing Mr. Ryan (Doc. 73) was entered upon Defendants' motion to dismiss (Doc.
19 63). Thus, the Court's Order, Defendants' motion, and Plaintiffs' Response (Doc. 68)
20 were all made without regard to any discovery and were all solely based on Plaintiffs'
21 Second Amended Complaint. Mr. Ryan was dismissed from this case under Federal Rule
22 of Civil Procedure 12(b)(6) and the federal pleading standard established in *Twombly*¹
23 and *Iqbal*² because Plaintiffs' failed to *plead* sufficient facts alleged under a cognizable
24 legal theory in their Second Amended Complaint. (Doc. 73 at 5-13). Extending
25 discovery per Plaintiffs' request would do nothing to remedy the deficiencies in
26 Plaintiffs' Second Amended Complaint which was filed before discovery ever began.

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28 ¹ See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

² See *Aschcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

1 Second, as discussed above in this section, Rule 60(b)(1) does not apply to
2 Plaintiffs' request because neither of the orders at issue were final orders and any
3 argument prefaced on excusable neglect is irrelevant. However, even if the Court were to
4 analyze the merits of Plaintiffs' argument, the Court would still not find that Plaintiffs
5 have established excusable neglect under these circumstances nor that they are entitled to
6 relief under Rule 60(b)(1).

7 "[P]arties are bound by the actions of their lawyers, and alleged attorney
8 malpractice does not usually provide a basis to set aside a judgment pursuant to Rule
9 60(b)(1)." *Casey v. Alberston's, Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004). Even if the
10 allegations against Ms. Wallace are true it would not establish grounds to set aside under
11 Rule 60(b)(1). *See Latshaw v. Trainer Wortham & Co.*, 452 F.3d 1097, 1101 (9th Cir.
12 2006) (no relief under Rule 60(b)(1) based on an attorney's innocent, careless, or
13 negligent mistakes, or even based on an attorney's intentional misconduct). Where a
14 party is aggrieved by his or her attorney's negligence, such claim is addressed through a
15 malpractice claim as opposed to relief under Rule 60(b). *Latshaw*, 452 F.3d at 1101
16 (attorney's errors are "more appropriately addressed through malpractice claims" and not
17 a Rule 60(b)(1) motion).

18 Third, the Court would still not grant Plaintiffs' motion even if Plaintiffs' requests
19 were analyzed under the proper standard. Plaintiffs' motion is effectively a motion for
20 reconsideration.

21 The Federal Rules of Civil Procedure do not recognize a
22 "motion to reconsider." A litigant subject to an adverse
23 judgment may file either a motion to alter or amend the
24 judgment under Rule 59(e) or a motion seeking relief from
25 the judgment pursuant to Rule 60(b). Fed.R.Civ.P. 59(e),
26 60(b). However, these rules only provide relief from
27 judgments that are "final, appealable orders." *United States*
28 *v. Martin*, 226 F.3d 1042, 1048 n. 8 (9th Cir. 2000).

1 *Campbell v. Fernando-Sholes*, CV 05-0880-PHX-SMM, 2009 WL 2030561, at *3 (D.
 2 Ariz. July 9, 2009). This court has adopted the following standards on which motions for
 3 reconsideration will be granted for interlocutory orders:

4 (1) There are material differences in fact or law from that
 5 presented to the Court and, at the time of the Court's decision,
 6 the party moving for reconsideration could not have known of
 7 the factual or legal differences through reasonable diligence;

8 (2) There are new material facts that happened after the
 9 Court's decision;

10 (3) There has been a change in the law that was decided or
 11 enacted after the Court's decision; or

12 (4) The movant makes a convincing showing that the Court
 13 failed to consider material facts that were presented to the
 14 Court before the Court's decision.

15 No motion for reconsideration shall repeat in any manner any
 16 oral or written argument made in support of or in opposition
 17 to the original motion.

18 *Motorola, Inc. v. J.B. Rodgers Mech. Contractors*, 215 F.R.D. 581, 586 (D. Ariz. 2003).
 19 While Plaintiffs have not attempted to meet any of these factors, the Court finds that
 20 given the facts that Plaintiffs have proffered there is still nothing that fulfills these
 21 factors.

22 Finally, Pursuant to Local Rule 7.2(g), "[a]bsent good cause shown, any motion
 23 for reconsideration *shall* be filed no later than fourteen (14) days after the filing of the
 24 Order that is the subject of the motion." LRCiv 7.2(g)(2) (emphasis added). The Order
 25 dismissing Mr. Ryan was filed on February 6, 2013. (Doc. 73). Computing time in
 26 accordance with Federal Rule of Civil Procedure 6(a), means that Plaintiffs had until
 27 February 20, 2013, to timely file this motion for reconsideration of that Order. However,
 28 Plaintiffs filed this motion on May 9, 2013, seventy-eight (78) days after the February 20
 deadline and ninety-two (92) days after February 6, 2013 Order which Plaintiffs are
 seeking to have this Court reconsider. According to Plaintiffs, counsel became aware of
 Ms. Wallace's neglect in late December 2012—over two months before the Order was

1 entered. Plaintiffs have not included a statement of good cause for the delay in filing
2 their motion for reconsideration. Thus, the Court also finds that this motion is not timely.

3 With regard to Plaintiffs' motion to set aside the Court's discovery deadline order,
4 the Order was entered on July 11, 2012 (Doc. 59), discovery ended on November 15,
5 2012, at the latest Plaintiffs were aware of the need for additional discovery in late
6 December 2012 when they discovered Ms. Wallace's neglect. Even if the Court were to
7 disregard how to calculate time under Rule 6(a), Plaintiffs filed their motion to reconsider
8 over four months later.

9 To be sure, Rule 60(b) allows a longer time frame for reconsideration motions
10 than does LRCiv 7.2. Under the Rule 60(b), reconsideration motions "shall be made
11 within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the
12 judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b). However,
13 as discussed above, Plaintiffs cannot avail themselves of the longer time frame in which
14 to file such a motion under Rule 60(b) because the orders which they are seeking to have
15 this Court reconsider are interlocutory in that no final judgment has yet been entered in
16 this case. Stated somewhat differently, the Court's discover deadline order and February
17 6, 2013, Order did not "end[] the litigation on the merits and leave [] nothing for the
18 court to do but execute the judgment." *See Catlin v. United States*, 324 U.S. 229, 233
19 (1945). Quite the contrary, as is evidenced by the Defense's pending summary judgment
20 motion there are a host of issues which the court must resolve before entering a final
21 judgment in this action.

22 Plaintiffs are essentially asking the Court to allow them to go on a proverbial
23 fishing expedition in order to find facts against Mr. Ryan that would first enable them to
24 plead a proper claim and subsequently allow them to support that claim, and to further
25 allow them to find an expert to establish their state law gross negligence claim. The
26 Court declines to assist Plaintiffs in this endeavor at both the Court's and Defendants'
27 expense after giving Plaintiffs' ample time for discovery already.

28 //


1 **III. CONCLUSION**

2 Based on the foregoing,

3 **IT IS ORDERED** that Plaintiffs' Rule 60(B)(1) Motion to Set Aside (Doc. 94) is
4 denied.

5 Dated this 16th day of August, 2013.

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James A. Teilborg
Senior United States District Judge